93-821

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MICHAEL A. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the government lacked personal jurisdiction to court-martial petitioner in light of *United States ex rel. Hirshberg v. Cook*, 336 U.S. 210 (1949), where petitioner received an Honorable Discharge but was convicted for offenses which occurred before his discharge?

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IN THE

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OCTOBER TERM, 1993

MICHAEL A. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Michael A. Murphy, respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment and order of the United States Court of Military Appeals rendered in that Court's proceeding on August 31, 1993, affirming the decision of the Navy-Marine Corps Court of Military Review.

OPINIONS BELOW

The order of the United States Court of Military Appeals, *United States v. Murphy*, ___ M.J. ___, No. 93-0752/MC (C.M.A. Aug. 21, 1993), is reprinted as Appendix A. The unpublished decision of the United States Navy-Marine Corps Court of Military Review, *United States v. Murphy*, No. 90 3537 (N.M.C.M.R. Feb. 19, 1993), is reprinted as Appendix B. The published decision of the United States Court of Military Appeals, *Murphy v. Garrett et al.*, 29 M.J. 469 (C.M.A. 1990), is reprinted as Appendix C.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on August 31, 1993. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

STATUTES INVOLVED

* * * * *

10 U.S.C. § 802(d) A member of a reserve component may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was—

(A) on active duty; or

* * * * *

10 U.S.C. § 803(a) Subject to section 843 of this title (article 43), no person charged with having committed, while in a status in which he was subjected to this Chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of termination of enlistment.

* * * * *

STATEMENT OF THE CASE

Petitioner served on active duty as a member of the United States Marine Corps from April 13, 1981, to May 30, 1988. On May 30, 1988, he received an Honorable Discharge from the United States Marine Corps and was simultaneously commissioned as a reserve officer and transferred to an inactive reserve unit at his own request. He had no further obligated service in the

United States Marine Corps Reserve. On August 23, 1989, and again on February 7, 1990, the government preferred charges against petitioner alleging violations of various Articles of the Uniform Code of Military Justice for misconduct which preceded his May 30, 1988 discharge. After May 30, 1988, petitioner participated in inactive-duty training with the Marine Corps Reserve, but none of the misconduct occurred during a "period of active duty training." Major General W.E. Boomer, U.S.M.C., Commanding General, Fourth Marine Division, a general court-martial convening authority in the regular component which administered United States Marine Corps reserve units, ordered petitioner to active duty for the purpose of conducting the general court-martial.

Petitioner first challenged the military's jurisdiction to court-martial him before the United States Court of Military Appeals by petitioning for extraordinary relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a). In that case, the Court of Military Appeals found that the military had personal jurisdiction over him. *Murphy v. Garrett, et al.*, 29 M.J. 469 (C.M.A. 1990).

Subsequently, petitioner was tried before officer members at a general court-martial and was convicted, in accordance with his guilty pleas, of three counts of violating a lawful general order and one count of dereliction of duty, violations of 10 U.S.C. § 892 and one count of conduct unbecoming an officer, a violation of 10 U.S.C. § 933. He was sentenced to a fine of $75,000.00 and to be dismissed from the naval service. The convening authority approved the sentence as adjudged, but pursuant to a pretrial agreement, suspended the fine for a period of 12 months from the date of his action.

The Navy-Marine Corps Court of Military Review affirmed petitioner's conviction in an unpublished decision where petitioner again raised the question of jurisdiction. *United States v. Murphy*, No. 90-3537 (N.M.C.M.R. Feb. 19, 1993). Petitioner filed a petition for grant of review on March 25, 1993 before the Court of Military Appeals, raising the jurisdiction question. On August

31, 1993, the Court of Military Appeals granted petitioner's petition and summarily affirmed his court-martial conviction, thereby allowing him to seek redress before this Court on this important issue of law. *United States v. Murphy*, __ M.J. __, No. 93-0752/MC (C.M.A. Aug. 31, 1993).

REASON FOR GRANTING THE WRIT

Questions of court-martial jurisdiction have historically concerned this Honorable Court. *See, e.g., United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210, 212 (1949); *Toth v. Quarles*, 350 U.S. 11 (1955); *Solorio v. United States*, 483 U.S. 435 (1987).[1] Most recently, this Court ruled that court-martial jurisdiction encompasses all offenses punishable under the Uniform Code of Military Justice whether service connected or not when the service-member is in an active duty status. *Solorio*, 483 U.S. at 450-51.

Yet, long ago, this Honorable Court held that offenses from a prior enlistment lack jurisdiction where the service member was discharged at the end of a prior enlistment and immediately reenlisted. *Hirshberg*, 336 U.S. at 219. In so ruling, this Court examined two statutes, one which arguably conferred jurisdiction and one which limited jurisdiction. *Id.* at 212-13. This Court rejected a literal translation of the statute conferring jurisdiction because of its "whimsical nature." *Id.* at 213-14.[2] Noting that the services had long since adhered to a statute restricting jurisdiction to offenses which occurred during the current enlistment except in the case of a fraud upon the government, this Court rejected the

[1] *See also United States v. Grimley*, 137 U.S. 147 (1890); *Reid v. Covert*, 354 U.S. 1 (1957); *O'Callahan v. Parker*, 395 U.S. 258 (1969), *rev'd*, 483 U.S. 435 (1987); *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971).

[2] Similarly, this Court abandoned the "service connection" test for jurisdiction set forth in *O'Callahan*, for the bright-line rule established in *Solorio*. *Solorio*, 483 U.S. at 441, 448.

government's tender to expand the jurisdiction of a court-martial. *Id.* at 218-19.

Since *Hirshberg*, Congress has changed the statutes which limit and control jurisdiction of military courts-martial. *Murphy*, 29 M.J. at 472. Yet, once again, one statute arguably expands jurisdiction, 10 U.S.C. 802(d)(2), while the other statute limits jurisdiction to offenses which occurred in a current enlistment, 10 U.S.C. 803(a). In determining that petitioner was still on "active duty," then Chief Judge Everett and Judge Sullivan acknowledged that, "[t]he exercise of military jurisdiction over petitioner may be inconsistent with the result reached in *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949)." *Murphy*, 29 M.J. at 472 (Everett, Sullivan, JJ concurring). In fact, the court below failed to apply the rule of *Hirshberg*: when testing for jurisdiction in the case of conflicting statutes, a court should first consider the statute which restricts jurisdiction. In this case, the court ignored the statute which denied jurisdiction, and instead applied a statute which allowed it to grant jurisdiction. In applying the latter statute, in order to establish jurisdiction, the court looked to petitioner's voluntary attendance at several unit drills. *Id.* at 472. Presumably, if petitioner simply chose not to attend these optional drills, a court-martial would have lacked jurisdiction. Thus, under the lower court's decision, in any given case where a court chooses to look first to the statute which grants jurisdiction, such jurisdiction is erratically conferred. As such, this Court should grant this petition to address whether the lower court's interpretation of two statutes, one which limits jurisdiction and one which seemingly enlarges jurisdiction, comports with this Honorable Court's decision in *Hirshberg*.

CONCLUSION

The expansion of court-martial jurisdiction presents a serious question of statutory construction. *Hirshberg*, 336 U.S. at 212; *Toth*, 350 U.S. at 13. The lower court's interpretation of "on active duty" conflicts with the rule of *Hirshberg*. It broadly extends court-martial jurisdiction which could capriciously confer jurisdiction in an untold number of cases. Accordingly, the Court should issue a writ of certiorari, to address this important issue of law.

Respectfully submitted,

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U.S. Naval Reserve
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November 23, 1993

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 93-0752/MC
CMR Dkt. No. 90-3537

UNITED STATES, APPELLEE

v.

MICHAEL A. MURPHY (201-56-9945), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Military Review, it is by the Court this 31st day of August, 1993

ORDERED:

That the petition for review is granted; and

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (SHELDON)
Appellate Government Counsel (BARKEY)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

R. A. JONES ALBERT A. REED T. A. LAWRENCE

UNITED STATES

v.

MICHAEL A. MURPHY, 201 56 9945
CAPTAIN (O-3), U.S. MARINE CORPS RESERVE

NMCM 90 3537 Decided 19 February 1993

Sentence adjudged 11 May 1990. Military Judge: R. E. OUELLETTE. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 4th Marine Division (Rein), FMF, USMCR, 4400 Dauphine Street, New Orleans, LA 70146-5400.

LT MARY L. LIVINGSTON, JAGC, USNR, Appellate Defense Counsel
LT T. S. SUSANIN, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

Appellant was tried by a general court-martial composed of officer members and was convicted in accordance with his pleas of three specifications of violating a lawful general order and one specification of dereliction of duty, in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892, and one specification of conduct unbecoming an officer, in violation of Article 133, UCMJ, 10 U.S.C. § 933. He was sentenced to a fine of $75,000 and to be dismissed from the Naval Service. The convening authority approved the sentence but in accordance with the pretrial agreement suspended the fine for 12 months from the date of his action.

This case was before the Court of Military Appeals by petition for extraordinary relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), appellant previously having sought and been denied injunctive relief in the federal courts. *Murphy v. Garrett*, 29 M.J. 469, 469-70 (C.M.A. 1990). The specific issue before the Court at that time was

> whether the United States Marine Corps [could] invoke jurisdiction over petitioner to require him to report for active duty to participate in the formal Article 32 Investigation of the charges *and whether, by implication, he can be ordered to active duty to stand trial by court-martial, should the charges be referred to trial.*

29 M.J. at 470 (emphasis added). The Court held that appellant could be ordered to active duty and denied the petition for extraordinary relief.

Appellant thereafter was recalled to active duty and tried with the result contained in our beginning paragraph. After appellate briefs were filed by the parties, and oral argument had been requested and denied, this Court informally asked appellate government and defense counsel whether either party desired to file a

supplemental pleading addressing the question whether the first assignment of error had already been decided conclusively by the Court of Military Appeals in the course of denying the petition for extraordinary relief. Subsequently, appellant filed a renewed request for oral argument, again denied, that addressed the question whether *Murphy v. Garrett* was controlling on the question of personal jurisdiction over appellant at the time of his court-martial.

The initial assignment of error requests us to decide whether appellant's court-martial lacked jurisdiction to try him for offenses committed prior to his honorable discharge from active duty in the regular component of the Marine Corps. However, as the Court of Military Appeals noted, such question is tempered by the fact that appellant immediately entered into a reserve component, participated in active duty training in the reserve component, and then was ordered to active duty by proper authority for investigation or trial of those offenses. We hold under these circumstances that there is personal jurisdiction over appellant.

The Court in *Murphy v. Garrett* stated that its decision, by implication, reached the question whether appellant could be ordered to active duty to stand trial. The Court decided that he could be. We perceive no meaningful difference between that issue and the one before us. We conclude that *Murphy v. Garrett* is the law of this case: accordingly, on this basis alone the first assignment of error is without merit.

Even were we free to consider the issue of personal jurisdiction anew, our holding would be no different since the reasoning of the Court in *Murphy v. Garrett* is compelling and persuasive. The holding in *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949), that military prosecution is barred for offenses occurring prior to discharge, even if discharge is for immediate reenlistment, is not constitutionally based. *See Murphy v. Garrett* at 472 (Everett, Sullivan, JJ., concurring); *United States v. Clardy*, 13 M.J. 308, 311-12 (C.M.A. 1982). It resulted from statutes then in effect which have subsequently been modified. Congress responded to

Hirshberg in 1951 by enacting Article 3(a), UCMJ, 10 U.S.C. § 803(a). In 1984, when the Court of Military Appeals in *United States v. Caputo,* 18 M.J. 259 (C.M.A. 1984), held that a reservist who was released from a 2-week active duty could not be recalled to active duty for court-martial of offenses occurring during the 2-week duty, Congress responded by amending Article 2, UCMJ, to remedy this deficiency. That resulting iteration of Article 2 is at issue in this case.

At the time of appellant's recall to active duty and at trial, Article 2 permitted the involuntary recall to active duty of a non-active duty reservist for investigation under Article 32 or trial pertaining to offenses committed while the reservist was "on active duty." Article 2(d), UCMJ, 10 U.S.C. § 802(d); *Murphy v. Garrett* at 470-71. The Court in *Murphy v. Garrett* concluded that "the term 'active duty' should be given its plain and ordinary meaning." 29 M.J. at 471. Judges Everett's and Sullivan's concurring opinion agreed, indicating that "the terms [of Article 2] Congress used—such as 'active duty'—have well-established meanings in military law; and we conclude that Congress intended for those terms to be given their plain and ordinary meaning." *Murphy v. Garrett* at 472. We adopt this interpretation not only because it is binding precedent but also because we are fully persuaded by the reasoning behind it. Clearly, appellant was on active duty when the offenses of which he was found guilty were committed. Having been properly ordered to active duty, appellant was therefore subject to the UCMJ and court-martial jurisdiction over him existed.

We perceive no constitutional infirmity in the statute or its application to appellant. Appellant was not a civilian who had severed all ties with the military whose trial would be barred by the holding in *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955). Appellant voluntarily elected to continue in a reserve component after his discharge. He received a reserve commission and attended drills for which he earned retirement points that

affect the amount of any retired pay to which appellant might have later been entitled. *Murphy v. Garrett* at 472 (Everett, Sullivan, JJ., concurring). His entry into a reserve component amounted to no more than a change of military status. We find no decision of the U.S. Supreme Court that suggests that his recall to active duty and court-martial for these offenses is unconstitutional.

Regarding the second assignment of error,[1] we note that the fine in this case was suspended. We have carefully examined the facts and circumstances surrounding these offenses and conclude that an unsuspended dismissal is a manifestly appropriate punishment.[2]

Accordingly, the findings and sentence, as approved and suspended in part below, are affirmed.

R. A. JONES, Senior Judge

ALBERT A. REED, Judge

T. A. LAWRENCE, Judge

[1] AN UNSUSPENDED DISMISSAL IS INAPPROPRIATELY SEVERE UNDER THE CIRCUMSTANCES OF THIS CASE. [FOOTNOTE OMITTED.]

[2] We note that the convening authority's action and court-martial order indicate that appellant was sentenced to a dishonorable discharge. He was dismissed.

APPENDIX C

U.S. COURT OF MILITARY APPEALS

Misc. Docket No. 90-04

MICHAEL A. MURPHY, CAPTAIN, U.S. MARINE CORPS RESERVE,
PETITIONER

v.

H. LAWRENCE GARRETT, SECRETARY OF THE NAVY; ALFRED M. GRAY, GENERAL, COMMANDANT, UNITED STATES MARINE CORPS; W.E. BOOMER, MAJOR GENERAL, COMMANDING GENERAL, FOURTH MARINE DIVISION, RESPONDENTS

Feb. 20, 1990
As Revised Feb. 23, 1990

For Petitioner: *Samuel J. Cordes* (argued).

For Respondents: *Lieutenant J. Richard Chema, J.A.G.C., U.S.N.* (argued); *Commander Thomas W. Osborne, J.A.G.C., U.S.N.* and *Lieutenant Colonel Joseph S. Uberman, U.S.M.C.* (on brief).

Opinion of the Court

COX, Judge:

This matter came on to be heard by this Court on February 15, 1990, as a result of an Order of this Court of February 9, 1990, temporarily staying "any order that petitioner report for active

duty . . . for a period of time not to exceed 10 days or until further order of the Court." The order further directed the respondents "to show cause, if any there be, why petitioner should not be represented by appellate defense counsel and why . . . [the] stay order should not be made permanent." Thus, we consider whether respondents should be enjoined permanently from ordering petitioner to active duty for the purpose of participating in an investigation ordered pursuant to the provisions of Article 32, Uniform Code of Military Justice, 10 USC § 832. Jurisdiction for this Court to act is asserted pursuant to the All Writs Act, 28 USC § 1651(a).

Prior to initiation of the present action in this Court, petitioner sought injunctive relief in the United States District Court for the Western District of Pennsylvania, which relief was denied on January 18, 1990, on the ground that he had failed to exhaust his remedies under the Uniform Code of Military Justice. Unpub. op. of Dist. Ct. at 25. He subsequently appealed this denial to the United States Court of Appeals for the Third Circuit, which denied his claim for relief on February 6, 1990. Justice Brennan, as Circuit Justice, denied a stay on February 9, 1990.

For the reasons hereinafter stated, we dissolve the temporary restraining order and deny the petition for extraordinary relief, which was filed along with the motion for a temporary stay and sought dismissal of the charges for lack of jurisdiction.

Viewing the factual matters before us in the light most favorable to petitioner's claim for relief, we conclude that the following facts are relevant to the disposition of this claim:

1. That petitioner served on active duty as a member of the United States Marine Corps from April 13, 1981, to May 30, 1988.

2. That on May 30, 1988, he received an Honorable Discharge from the United States Marine Corps and was simultaneously commissioned as a reserve officer and transferred to the Marine Corps Reserve pursuant to his own request. He had no further obligated service in the United States Marine Corps Reserve.

3. That on August 23, 1989, and again on February 7, 1990, charges were preferred against petitioner alleging violations of various Articles of the Uniform Code of Military Justice for misconduct before May 30, 1988. Among th evarious charges preferred against him is an allegation that he obtained his discharge by fraud, in violation of Article 83, UCMJ, 10 USC § 883.

a. The charges arise out of petitioner's participation in a funded legal education program provided by the Marine Corps and his conduct in procuring his release from the obligations of that program. Charges likewise arise out of and relate to petitioner's continued attendance in law school while regularly assigned other duties as a recruiting officer in Pittsburg, Pennsylvania.

b. All charges and specifications preferred against petitioner directly or indirectly relate to his performance of duties while an active-duty commissioned officer in the United States Marine Corps.

4. That after May 30, 1988, petitioner has participated in inactive-duty training with the Marine Corps Reserve, but none of the alleged misconduct occurred during a "period of inactive duty training."

5. That petitioner has been ordered to active duty pursuant to appropriate service regulations by Major General W. E. Boomer, Commanding General, Fourth Marine Division, a general court-martial convening authority in the regular component, United States Marine Corps.

The narrow questions that we now decide are whether the United States Marine Corps can invoke jurisdiction over petitioner to require him to report for active duty to participate in the formal Article 32 Investigation of the charges and whether, by implication, he can be ordered to active duty to stand trial by court-martial, should the charges be referred to trial.

The pertinent statutory law concerning this case is Article 2 of the Uniform Code of Military Justice, 10 USC § 802. That Article provides in pertinent part:

§ 802. Art. 2 Persons subject to this chapter

* * * * *

(d)(1) A member of a reserve component who is not on active duty and who is made the subject of proceedings under section 815 (article 15) or section 830 (article 30) with respect to an offense against this chapter may be ordered to active duty involuntarily for the purpose of—

(A) investigation under section 832 of this title (article 32);

(B) trial by court martial; or

(C) nonjudicial punishment under section 815 of this title (article 15).

(2) *A member of a reserve component* may not be ordered to active duty under paragraph (1) except with respect to an offense committed while the member was

(A) *on active duty;* or

(B) on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(3) Authority to order a member to active duty under paragraph (1) shall be exercised under regulations prescribed by the President.

(4) A member may be ordered to active duty under paragraph (1) only by a person empowered to convene general courts-martial in a regular component of the armed forces.

(5) A member ordered to active duty under paragraph (1), unless the order to active duty was approved by the Secretary concerned, may not—

(A) be sentenced to confinement; or

> (B) be required to serve a punishment consisting of any restriction on libertyduring a period other than a period of inactive-duty training or active duty (other than active duty ordered under paragraph (1)).

(Emphasis added.)

We are called upon to determine whether the term "active duty" within Article 2(d)(2)(A) is narrowly limited to those periods of active duty while the member is in the reserve component or whether the term "active duty" includes all periods of the member's active duty regardless whether the member is in the regular component or the reserve component at the time of the alleged offenses. *Compare United States v. Overton*, 24 MJ 309 (CMA), *cert. denied*, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987), *with United States v. Caputo*, 18 MJ 259 (CMA 1984).

We conclude that the term "active duty" should be given its plain and ordinary meaning. *Cf. Pearson v. Bloss*, 28 MJ 376, 378-79 (CMA 1989). The relevant question is whether the offenses allegedly occurred while the member was either (1) on active duty or (2) on inactive-duty training.

Assuming that the United States Marine Corps has complied with appropriate service regulations pertaining to the order to active duty, a member of the reserve component may be ordered to active duty for the purpose of an investigation under Article 32 of the Uniform Code or for a court-martial. The fact that his regular service was terminated by the issuance of an Honorable Discharge and that his reserve service commences upon the simultaneous issuance of a new commission does not divest his armed force of jurisdiction.

Petitioner has asked us to consider the constitutional limitations of trying him by court-martial. Because of his continuing active contacts with the United States Marine Corps through regular periods of inactive-duty training and the nature of the charges against him, we need not address this issue. Likewise, we do not

decide the constitutional question whether a member of the inactive reserve who has *no contacts* with an armed force could be ordered to active duty. *Cf. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

Respondents have urged us to consider as an alternative basis for jurisdiction the fact that charges have been preferred against petitioner for fraudulently procuring his discharge, in violation of Article 83 of the Code. *See United States v. Cole*, 24 MJ 18 (CMA), *cert. denied*, 484 U.S. 828, 108 S.Ct. 97, 98 L.Ed.2d 58 (1987); *Wickham v. Hall*, 12 MJ 145 (CMA 1981). Article 3(b) of the Uniform Code of Military Justice provides:

> (b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

We decline to rule upon this alternative ground because we have concluded that jurisdiction is firmly rooted in petitioner's reserve status under Article 2(d), UCMJ, 10 USC § 802(d).

The temporary stay provided for in the order of February 16, 1990, is hereby dissolved, and the petition for extraordinary relief dated February 8, 1990, is hereby denied.

EVERETT, Chief Judge, and SULLIVAN, Judge (concurring):

In *United States v. Caputo*, 18 MJ 259 (CMA 1984), this Court held that, under existing statutory provisions, a reservist who had been released from a 2 week tour of duty during which he allegedly had violated the Uniform Code of Military Justice could not thereafter be called to duty for purposes of court-martial. *See also Duncan v. Usher*, 23 MJ 29 (CMA 1986). Congress was dissatis-

fied with the results in these cases and decided to amend the Uniform Code. The language Congress employed to do so—which is set forth in the majority opinion—appear to go beyond the situation presented by *Caputo* and to include the situation of petitioner Murphy. However, the terms Congress used—such as "active duty"—have well-established meanings in military law; and we conclude that Congress intended for those terms to be given their plain and ordinary meaning. *Cf. Pearson v. Bloss*, 28 MJ 376, 378-79 (CMA 1989).

The exercise of military jurisdiction over petitioner may be inconsistent with the result reached in *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210, 69 S.Ct. 530, 93 L.Ed. 621 (1949); *but cf. United States v. Clardy*, 13 MJ 308 (CMA 1982). However, *Hirshberg* was predicated on the statutes in effect at that time and the established interpretation of those statutes. Congress was free to change the result reached in *Hirshberg*, and we conclude that it did so. Indeed, such a change would seem to accord fully with the purpose which motivated the legislative overruling of *Caputo*—namely, to avoid jurisdictional gaps resulting in crime without punishment.

Insofar as constitutional considerations are concerned, *see United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed.8 (1955), this is not the case of a former servicemember who has totally severed his connection with the military establishment and thereafter is being prosecuted by military authorities for crimes committed while on active duty. Indeed, it is not the case of a person who, after leaving active duty, has remained in the inactive reserve but has not participated in military drills or training. As petitioner's counsel conceded during oral argument before this Court, Murphy has participated in military drills a dozen or more times since he resigned his regular commission as a Marine Officer and accepted a reserve commission. Apparently he received military retirement points by reason of this participation; and he may have received military pay as well. In view of petitioner's extensive

continuing contacts with the Marine Corps, we are convinced that subjecting him to military jurisdiction is constitutional. *Cf. United States v. Overton*, 24 MJ 309 (CMA 1987).

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